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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

STATE OF MISSOURI, at the Relation of MISSOURI INSURANCE COMPANY, a Corporation, Relator, Appellant,

vs.

FREDERICK GEHNER, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis; A. R. SCHOLLMEYER, CLYDE CARSON, WILLIAM L. HECKMANN and JOSEPH J. LICHTENFELD, as Members of the Board of Equalization of the City of St. Louis, Appellees.

No. 222.

BRIEF IN OPPOSITION TO ISSUANCE OF THE WRIT OF CERTIORARI.

JULIUS T. MUENCH,
City Counselor,
OLIVER SENTI,
First Associate City Counselor,
Counsel for Appellees.

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I.

OPINION OF THE COURT BELOW.

Appellant's statement under this title, at page 17 of its brief, is adopted by the appellees.

II.

Jurisdiction.

(a) **Statutory provisions relating to jurisdiction.**

It is admitted that the several statutory provisions relating to certiorari are correctly set out in paragraph (a) of subdivision II of appellant's brief.

Section 8 (a) of the act of Congress of February 13, 1925 (43 Stat. L. 936; U. S. Code, Title 28, Sec. 350), which appellant has not set out, in part provides:

> "That no * * * writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review, shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *."

(b) **Date of decree and application for appeal.**

Appellant's petition for certiorari was not filed within three months after final judgment, as required by Section 8 (a) of the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 350).

The motion for rehearing of the appellant as relator below was overruled and the modified opinion of the Supreme Court of Missouri, which is the final decree, was entered on March 27, 1929 (Tr., p. 62). The petition for appeal herein was presented to the Chief Justice of the Supreme Court of Missouri on June 24, 1929, within three

months after the date of the overruling of relator's motion for rehearing, and the appeal was allowed on said June 24, 1929 (Tr., pp. 76, 77).

After the docketing of the appeal herein in this court appellant's petition for certiorari was filed, on the papers on which the appeal was granted and the transcript herein.

(c) **Nature of the ruling below.**

Sections 6 and 7 of Article X of the Constitution of Missouri are as follows:

> "Sec. 6. **Property exempt from taxation.**—The property, real and personal, of the state, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also such property, real or personal, as may be used exclusively for agricultural or horticultural societies: **Provided,** That such exemptions shall be only by general law.
>
> "Sec. 7. **Other exemptions void.**—All laws exempting property from taxation, other than the property above enumerated, shall be void."

The general law of the state governing the return and assessment of property for taxation (Section 12766, Re-

vised Statutes of Missouri 1919, as amended, Laws of Missouri 1923, page 275), so far as here material, provides:

> "Sec. 12766. The Assessor * * * shall * * * proceed to take a list of the taxable personal property in his county, town or district and assess the value thereof in the manner following, to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such person to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise, which may be required to pay a license tax, being in any county of this state, in accordance with the provisions of this chapter; and the person listing the property shall enter a true and correct statement of such property on a printed or written blank prepared for that purpose * * *."

Section 6386, Revised Statutes of Missouri 1919, the construction of which by the State Court appellant seeks to have reviewed on certiorari, so far as pertinent, reads:

> "Sec. 6386. **Home Companies Subject to What Tax.**—The property of all insurance companies organized under the laws of this state shall be subject to taxation for state, county, municipal and school purposes, as provided in the general revenue laws of this state in regard to taxation and assessment of insurance companies. Every such company or association shall make returns, subject to the provisions of said laws: First, of all the real estate held or controlled by it; second, of the net value of all its other assets or values in excess of the legally required reserve neces-

sary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals."

After referring to the provisions of this section, the court below, at the point indicated by the asterisks in the excerpt from the opinion set out at page 21 of appellant's brief, said:

"Relator claims, inferentially, that it has invested its surplus in United States bonds, nontaxable assets, and that it has put its legal reserve and working capital into other securities, which are subject to taxation; and that therefore the reserve and all other liabilities should be deducted from the taxable assets alone. But surplus, earnings, undivided profits, etc., are mere bookkeeping terms. The legal reserve is not a segregated fund; it is a measure of liability, a test of solvency; the amount that would be required to make a present settlement with all of relator's policyholders, or to reinsure its risks; it is an indebtedness (State ex rel. Missouri State Life Ins. Co. v. Gehner [Mo. Sup.], 8 S. W. [2d] 1068, 1072). And relator's indebtedness, legal reserve and unpaid policy claims, is a charge against all of its assets, both taxable and nontaxable.

"To put the question concretely: Relator's nontaxable assets amount to $94,000.00, its taxable assets to $590,265.33 (real, $142,000.00; personal, $354,265.33), both are subject to liabilities aggregating $333,486.69 —what is the net value of the taxable personal assets under section 6386? (15 S. W. [2d], l. c. 535) (Tr., pp. 38 to 40).

The Supreme Court of Missouri, in State ex rel. Gehner, 8 (2d) S. W. 1057, l. c. 1059, as we interpret that decision, held that, if so construed as to permit a domestic insurance company to deduct all of its reserve and unpaid policy claims from its taxable assets, section 6386 is unconstitutional.

(d) **Certiorari is discretionary and should be denied.**

Certiorari is not a writ of right, but its issuance is discretionary.

> Ireland v. Woods, 246 U. S. 323, l. c. 328;
> Twitchell v. Pennsylvania, 7 Wall. 321;
> Philadelphia & R. Coal & Ice Co. v. Gilbert, 245 U. S. 162.

Appellant's right to deduct from its **taxable** property return **any** part of its legal reserve or unpaid policy claims rests upon Section 6386, R. S. Mo. 1919, or does not exist.

The Missouri Supreme Court, in State ex rel. v. Gehner, supra, has held that, if so construed as to permit Appellant to deduct all of its reserve and unpaid policy claims from its **taxable** assets, section 6386 is unconstitutional. In that event the appellant must, in accordance with the requirements of Section 12766, R. S. Mo., return for taxation the whole of its taxable personal property, which (Appellant's Brief, p. 3) consists of money deposited in bank or other safe place, $5,265, and bonds of state, county, town, city, township, incorporated or unincorporated companies of the value of $255,000.

SUMMARY OF ARGUMENT.

I.

Effect of Statute as Construed by State Court.

Section 6386, Revised Statutes of Missouri, 1919, imposes a tax on the net assets of domestic insurance companies.

State ex rel. v. Schramm, 271 Mo. 223.

As construed by the court below, appellant s taxable and nontaxable assets are apportioned between its liabilities and its net assets, and the tax on the latter is calculated by excluding that part thereof which consists of Government bonds.

To construe the statute otherwise would be to render it unconstitutional.

State ex rel. American Automobile Insurance Co. v. Gehner, 8 (2d) S. W. 1057, l. c. 1059.

If Section 6386 is so construed as to violate the State Constitution it is a nullity, and the whole of relator's property, except its Government bonds, is taxable under the general laws of the State.

Section 12766, R. S. Mo. 1919.

II.

Missouri Decisions Relied on by Appellant.

The decisions of the Missouri Supreme Court cited by the appellant in support of its contention that, under the laws

of Missouri, domestic insurance companies having no Government bonds are permitted to deduct the whole of their legal reserve from their tax return, do not hold that the net assets of a domestic insurance company shall, for the purpose of taxation, be computed otherwise than by deducting its taxable reserve from its taxable assets.

III.

Federal Decisions Relied Upon by Appellant.

The appellant cites numerous federal decisions holding that any method of calculation of assets which directly or indirectly results in the taxation of Government bonds violates the Federal Constitution.

The cases cited are not decisive, because they involve statutes which contemplate the imposition of a tax either directly or indirectly upon the obligations of the Federal Government, while section 6386, as construed below, does no more than to tax the net assets of domestic insurance companies calculated by excluding that part of the net assets which consists of Government bonds.

ARGUMENT.

I.

Practical Effect of the Statute as Construed by the State Court.

It cannot be disputed that it is beyond the power of the states to impose a tax on securities of the United States. The question which this Court must ultimately determine, then, is, whether in point of fact the State has taxed Government bonds belonging to the appellant. The first useful step in the solution of this question, as this Court in Home Savings Bank v. Des Moines, 205 U. S. 503, l. c. 510, has heretofore said, is to ascertain with precision (a) the nature of the tax in controversy, (b) upon what property it was levied and (c) that step must be taken by an examination of the taxing law as interpreted by the Supreme Court of the state.

(a) The nature of the tax assessed pursuant to Section 6386, R. S. Mo. 1919, is definitely established as a tax on the net assets of domestic insurance companies. In State ex rel. Schramm, 271 Mo. 223, the Court, in speaking of what is now section 6386, l. c. 226, said:

> "The statute (Sec. 7098) prescribes a system of taxation and net assets."

(b) The language quoted also definitely determines that the tax is one levied upon the net assets of domestic insurance companies.

(c) An examination of the taxing law as interpreted by the Supreme Court of the state, in order to appreciate the reasoning and measure the correctness of the opinion below, we think necessarily involves an examination of previous decisions of the Supreme Court of Missouri; also certain provisions of the Constitution of the State.

In State ex rel. v. Schramm, supra, it was decided, as we show at page 9, that what is now section 6386 prescribes a system of taxation of the net assets of domestic insurance companies.

The Constitution of the state, by sections 6 and 7 of article X (set out at page 3), provides that all laws exempting from taxation property other than that of the state, counties or municipalities, cemeteries and property used for religious or educational or purely charitable purposes, or for the purposes of agricultural or horticultural societies, shall be void.

Having in mind this provision of the State Constitution, the Supreme Court of Missouri, in State ex rel. American Automobile Insurance Company v. Gehner, 8 (2d) S. W. 1057, in effect, held that to construe section 6386 so as to permit a domestic insurance company to deduct the whole of its reserve from its taxable assets would not only defeat the purpose of the statute, but would defeat the policy of the state to maintain equality of taxation in accordance with the demands of the Constitution.

Practically all of the states treat the legal reserve of an insurance company as belonging to its policyholders,

and have enacted regulatory laws designed to keep intact the legal reserve necessary to reinsure outstanding risks. This policy is also reflected in the tax laws of many states, and insurance companies, instead of being required, like other corporations and individuals, to return for assessment all property which they own or which is in their possession or under their control, are taxed only upon their net assets. The principle underlying the method by which the amount of the net assets is determined is the deduction from the gross assets of the liabilities (the reserve) which in fact belongs to the policyholders. In accordance with this policy, the Legislature of Missouri enacted section 6386 to relieve domestic insurance companies from paying taxes on any property except their net assets.

The assets of the Missouri Insurance Company consist of:

Real Estate	$142,000.00	
Government Bonds	94,000.00	
Taxable Personal Property	354,265.33	
Total	$590,265.33	
Its liabilities, consisting of Legal Reserve and Unpaid Policy Claims are		$333,486.00
		(Opinion below.)

The Court below, knowing that the statute violated the State Constitution if construed so as to permit the company to deduct from its taxable assets that part of its liabilities consisting of property which it is beyond the power of the state to tax, apportioned its taxable and

nontaxable property to its liabilities and to its net assets; found that the company's taxable assets are approximately 84 per cent of its gross assets; that 84 per cent or $280,128.81 of its liabilities (legal reserve and unpaid policy claims) consisted of taxable property; and that the company was authorized by the statute to deduct that amount from its taxable assets.

The effect of this ruling was to permit the appellant to deduct from its return all that the Legislature could authorize it to deduct without violating the State Constitution.

Its effect was also to permit appellant to deduct from its return that part of its reserve which is invested in taxable personal property and which it was within the power of the state to tax without violating either the State Constitution or the Federal Constitution or laws.

The construction placed upon the statute below is the only means by which the state court could give appellant the benefit of the policy of the state to relieve domestic insurance companies from the payment of taxes on property in which they have that part of their assets representing their legal reserve and unpaid policy claims (liabilities) invested, and which in fact belongs to their policyholders. This, we think, is apparent when the different classes of the company's assets are allocated to the respective funds which the state court regards as liabilities belonging to the policyholders and as net assets belonging to the company.

The legal reserve and unpaid policy claims (liabilities) aggregate $333,486.00, which represents approximately 56.5 per cent of the total assets; the remaining (approximately) 43.5 per cent represents the net assets, the taxation of which is the purpose of the statute.

The different classes of property of which the assets consist when apportioned on this basis between the liabilities (reserve and unpaid claims) and the net assets are as follows:

	Liabilities 56.5%	Net Assets 43.5%	Total
Government Bonds	$ 53,110	$ 40,890	$ 94,000
Real Estate	80,230	61,770	142,000
Taxable Personal Property	200,160	154,105	354,265
	$333,500	$256,765	$590,265

Under the statute the real estate is taxed as other property. Hence the company, in deducting its real estate from the aggregate amount of its net assets, as the statute authorizes it to do, in computing the amount of its taxable net assets, is entitled to deduct not only the $61,770.00 allocated to its net assets, but also the $80,230.00 allocated to its liabilities, or a total of $142,000.00. It is also entitled to exemption on the Government bonds ($40,890.00) of which the net assets in part consist. The net value of its personal property for the purpose of taxation, then, is computed as follows:

Total Net Assets		$256,765.00
Government Bonds Exempt	$ 40,890	
Real Estate (taxed as other property	142,000	182,890.00
Taxable Net Assets		$ 73,875.00

This varies slightly from the amount which the Court below found the company might have been assessed, because, in both computations, approximate percentages were used, decimals not being carried out. The variation, however, is immaterial, as the assessment made by the taxing authorities, and which the appellant seeks to have quashed, is only $50,000.00.

II.

Missouri Decisions Relied on by Appellant.

In State ex rel. v. Schramm, 271 Mo. 223, 196 S. W. 21, cited by appellant, the taxing officials assessed the American Automobile Insurance Company on its total assets, including Government bonds, less its legal reserve. In this case, the appellant is only being assessed on its **taxable** assets, less the **taxable** portion of its reserve.

On page 40 of its brief, appellant, for the purpose of showing it is the law of Missouri that, under section 6386, a domestic insurance company having no tax-exempt securities may deduct its entire reserve, cites:

> State ex rel. American Automobile Ins. Co. v. Gehner, 8 S. W. (2) 1057;

State ex rel. Citizens' Ins. Co. v. Gehner, 8 S. W. (2d) 1066;
State ex rel. Indemnity Co. of America v. Gehner, 8 S. W. (2d) 1067;
State ex rel. International Life Ins. Co. v. Gehner, 8 S. W. (2d) 1067;
State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068;
State ex rel. Central States Life Ins. Co. v. Gehner, 8 S. W. (2d) 1073.

None of these cases hold that a domestic insurance company having no tax-exempt securities can compute its assets for the purpose of taxation under section 6386 otherwise than by deducting its taxable reserve from its taxable assets, and that is the method by which the court below held that appellant's net assets should be computed.

III.

Federal Decisions Relied Upon by the Appellant.

The appellant asserts that, under the provisions of the Federal Constitution and statutes, this Court has uniformly held that any method of taxation or calculation of assets which directly or indirectly results in the taxation of Government securities, in whatever form, is beyond the power of the several states and the municipalities of the several states, citing:

Farmers Bank v. Minnesota, 232 U. S. 516;
Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136;
Miller v. Milwaukee, 272 U. S. 713;
Supervisors v. Stanley, 105 U. S. 305;
National Life Ins. Co. v. United States, 277 U. S. 508.

In our statement in opposition to jurisdiction on appeal, at page 6, we pointed out that these cases may be distinguished, in that the statute involved in each of them contemplates the imposition of a tax either directly or indirectly on the taxpayer's property, even if the whole of such property is in obligations of the United States; while in the case made by the record here the operation of the statute does not have that effect. We have endeavored, at page 13 hereof, to make this distinction clear, by showing that section 6386 does no more than impose a tax on the net assets of the appellee, calculated by excluding that part of the net assets which consist of Government bonds.

Home Insurance Company v. New York, 134 U. S., l. c. 598, also cited by appellant in support of this proposition, involved the validity of a corporation franchise tax imposed by the state and measured by the amount of the dividends on the capital stock of the corporation, a part of which capital stock was invested in Government bonds, and the Court, after referring to McCulloch v. Maryland, 17 U. S. 4 Wheat. 436; Weston v. Charleston, 27 U. S. 2

Pet. 449, and Brown v. Maryland, 25 U. S. 12 Wheat. 418, l. c. 599, said:

> "Looking now at the tax in this case upon the plaintiff in error, we are unable to perceive that it falls within the doctrines of any of the cases cited, to which we fully assent, not doubting their correctness in any particular. It is not a tax in terms upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock. The statute designates it a tax upon the 'corporate franchise or business' of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year."

Continuing, the Court (l. c. 600) quoted from the Delaware Railroad Tax Case, 85 U. S. 18 Wall. 206, as follows:

> "The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

The case not only does not support the appellee's contention, but tends to sustain the right of the states to do what Section 6386, R. S. Mo. 1919, as construed by the court below, does, to wit, impose a tax on the net assets of domestic insurance companies while in no sense imposing a tax on that part of the net assets consisting of Government bonds.

Appellant also cited Home Savings Bank v. Des Moines, 205 U. S. 503. The statute before the Court in that case provided that shares of stock in state and savings banks and the loan and trust companies should be assessed to such companies and not to individual shareholders. The Home Savings Bank owned United States bonds, which the taxing authorities refused to deduct in computing the value of the shares. The issue in that case bears no resemblance whatever to the question here. The net assets of the bank, including its United States bonds, were taxed, while, in the present case, the tax is on only that part of the net assets of the company which remains after deducting such of the net assets as consist of United States bonds.

Conclusion.

We submit that it follows from the foregoing discussion that Section 6386, R. S. Mo. 1919, as construed below, does not destroy the exemption from taxation granted to owners of Government bonds; that the statute merely imposes a tax on the net assets of domestic insurance com-

panies, except so much thereof as consist of tax-exempt securities; that appellant's right to deduct from its taxable property returned, any part of its liabilities, is not a privilege or immunity conferred by the Constitution or laws of the United States, but rests upon the state statute, or does not exist; that, if the statute is construed as appellant contends, it is a nullity, and the whole of appellant's taxable personal property, amounting to $354,265, is subject to taxation under Section 12766, R. S. Mo. 1919, which is set out at page 4; that the statute as construed below, instead of depriving appellant of its property without due process of law, or denying it the equal protection of the law, gives it immunity from taxation on all of its personal property except $74,136.52, although the same property might be assessed at $354,265 without violating either the State Constitution or the Federal Constitution or laws; and that, as construed by the Supreme Court of Missouri, the statute deprives the appellant of no right under the Constitution and laws of the United States, for the protection of which it is entitled to this Court's writ of certiorari.

Respectfully submitted,

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Counsel for Appellees.

In appellees' printed statement in opposition to jurisdiction on appeal, heretofore filed, the words "deductions from its" were inadvertently omitted after the word "its" in the last line on page 7. The sentence should read:

"To have so construed the statute as to render it unconstitutional would have deprived the company of all of its deductions from its taxable assets, leaving all of its property, except its tax-exempt Government bonds, subject to taxation."